



DECISION

Fair Work Act 2009

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Australian Entertainment Industry Association T/A Live Performance

Australia

(AM2010/110)

COMMISSIONER LEWIN

MELBOURNE, 2 MARCH 2011

[1] This Decision concerns an application to vary the *Live Performance Award 2010* (the Modern Award) pursuant to s.160 of the *Fair Work Act 2009* (the Act). Live Performance Australia sought 26 variations to the Modern Award which were contained in a schedule annexed to the application which was lodged in Fair Work Australia on 16 July 2010.

[2] For convenience, s.160 of the Act is set out below:

“160 Variation of modern award to remove ambiguity or uncertainty or correct error

(1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) FWA may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award.”

[3] Submissions in relation to the application were filed in Fair Work Australia by Gig Power Pty Ltd (Gig), the Media, Entertainment and Arts Alliance (MEAA) from 2 - 25 August 2010.

[4] Upon receipt of the abovementioned submissions, Directions were posted on the Award Modernisation Website whereby any parties who wished to file further submissions or submissions in reply to materials already filed in this matter were required to do so by 4.00 pm on Friday 3 September 2010.

[5] Submissions were received pursuant to these Directions from the Musicians' Union of Australia (MUA), Live Performance Australia (LPA) and Showcall Crewing Pty Ltd (Showcall).

[6] It became apparent that there was some disagreement between the parties about the variations subject of the application. I also had concerns that a significant proportion of the 26

variations sought were not variations which fell within the jurisdictional scope of s.160 of the Act. Such variations, on my reading of the application and the provisions of the Modern Award, would have affected the substantive level of the relevant terms and conditions of employment prescribed by the Modern Award, which are expressed unambiguously and with certainty by its terms where no error in the relevant sense was discernable. A variation of this kind is a variation contemplated by s.157 of the Act, rather than s.160. The proper approach to the determination of the application for a variation to a modern award under s.157 of the Act is different in character to that appropriate to an application for a variation under s. 160.

[7] A conference was listed on 17 November 2010 to discuss the appropriate procedure to deal with one aspect of the application. During that conference, the parties suggested that certain issues arising under the application would be dealt with discretely, while others would be dealt with at a Hearing. I concurred with this procedure.

[8] At the Conference, Mr D Hamilton, Ms V English and Mr P English appeared for LPA. Mr Economidis appeared for Showcall. Ms L Svendsen appeared for Gig.

[9] The application was listed for Hearing on 24 November 2010 to hear submissions in support of the application.

[10] At the Hearing, Mr D Hamilton and Ms S Ong-Tan appeared for LPA. Mr T Noone appeared for the MUA. During the Hearing LPA made submissions in relation to the variations sought with the exception of the matter dealt with at the conference which concerned the provisions of the award applicable to a discrete part of the industry covered by the award. In particular, I engaged Mr Hamilton in discussions relating to which of the variations fell within the jurisdictional scope of s.160 of the Act.

[11] During the Hearing Mr Hamilton sought leave to amend the application to omit certain variations sought by the application and to amend other variations sought in order that they fell within the jurisdictional scope of s.160 of the Act. Leave was granted.

[12] On 10 December 2010, Mr Hamilton filed an amended application in Fair Work Australia reflecting the amendments foreshadowed at the Hearing of 24 November 2010.

[13] Upon receipt of the abovementioned submissions, a further Direction was posted on the Award Modernisation Website requiring any parties who opposed the variation in the terms of the amended application to file submissions in support of their opposition to approval of the variation of the modern award by the close of business on 9 February 2011. No submissions were filed in response to this Direction.

[14] I am satisfied that the variations sought in the amended application fall within the jurisdictional scope of s.160 of the Act. The variations sought deal with erroneous provisions, textual inconsistencies, inappropriate cross referencing within the structure of the Modern Award, which is unnecessary and confusing, superfluous repetition of the provisions of the award and structural and other formatting inconsistencies in the terms of the Award which likewise are capable of giving rise to uncertainty of application. An Order varying the Award in the terms of the application as amended will issue.

COMMISSIONER

Appearances:

Mr D Hamilton and Ms S Ong-Tan for Live Performance Australia.

Mr T Noone for the Musician's Union of Australia

Hearing details:

2010.

Melbourne:

November 24.

Final written submissions:

10 December 2010.

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